BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

APR 23 1987

Mr. George L. Schroeder
Director
Legislative Audit Council
State of South Carolina
620 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

We are pleased to respond to your invitation to assist in the sunset review of the laws governing, and regulations implemented by, the South Carolina State Boards of Podiatry Examiners, Occupational Therapy Examiners, Speech and Audiology Examiners, and Psychology Examiners.[1] Our comments address: (1) restrictions on business practices of professionals, including restrictions on corporate practice, employment of professionals by corporations, and commercial affiliations, (2) restrictions on truthful, nondeceptive advertising, and (3) restrictions on advertising and fee splitting that are incorporated directly from ethical rules promulgated by private professional associations composed of competitors. In our view, these three types of provisions are likely to injure South Carolina consumers, and we therefore urge the Council to seek their repeal or modification.

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered under 15 U.S.C. § 41, et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to its statutory mandate, the Commission encourages competition among members of the licensed professions to the maximum extent compatible with legitimate state and federal goals. For several years, the Commission staff has been investigating the competitive effects of restrictions on the kinds of business arrangements that state-licensed professionals,

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[1] These comments represent the views of the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission, and do not necessarily represent the views of the Commission itself. The Commission has, however, voted to authorize us to submit these comments to you.

kinds of business arrangements that state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others, are permitted to use in their respective professions. Our goal is to identify and seek the removal of restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

As a part of the Commission's efforts to foster competition among licensed professionals, it has examined public and private restrictions that limit the ability of professionals to engage in truthful and nondeceptive advertising.[2] The Commission's staff has gained considerable experience with the economics of competition among health professionals, and with the effects of state board regulation on competition.

II. Restrictions on the Practice of Podiatry

S.C. Code Ann. § 40-51-210 prohibits any person from incorporating for the purpose of providing podiatry services to the public. This "corporate practice" restriction apparently prevents podiatrists from practicing as corporations or affiliating with lay corporations. It is also unlawful for podiatrists to open an office or practice podiatry "in connection with a commercial establishment," S.C. Code Ann. § 40-51-250, which apparently means that podiatrists cannot practice in commercial settings such as department or drug stores. Such restrictions are anticompetitive and harmful to consumers because they prevent podiatrists from choosing the form of practice they consider most efficient, they increase the costs of providing

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[2] See Wyoming State Board of Registration in Podiatry, 107 F.T.C. 19 (1986)(consent order)(settling charges that the Board, through regulations it promulgated and enforced, had restrained competition among podiatrists by restricting the truthful advertising of podiatric goods and services); Louisiana State Board of Dentistry, 106 F.T.C. 65 (1985)(consent order)(settling charges that the Board, through regulations it promulgated and enforced, had restrained competition by restricting the advertising of the cost and availability of dental services); Montana Board of Optometrists, 106 F.T.C. 80 (1985)(consent order)(settling charges that the Board, through regulations it promulgated and enforced, had restrained competition by restricting the truthful advertising of prices and claims of professional superiority); American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982)(holding that the AMA had illegally conspired to restrain competition among physicians by suppressing through its ethical guidelines truthful advertising and other forms of solicitation of patients by member physicians).

podiatry services, and they deter entry into the market by new podiatrists. Thus, we urge the Council to recommend that these statutory restrictions be repealed.

The combined effect of corporate and commercial practice restrictions is to prevent podiatrists from choosing whatever they consider to be the most efficient way to practice. These restrictions would, for example, prevent podiatrists from forming or affiliating with business arrangements such as ambulatory clinics or health maintenance organizations ("HMOs") that are not controlled by podiatrists or are "commercial." Such arrangements can facilitate entry by new practitioners and lead to high-volume practices that may be more efficient than traditional practices. Competition from new entrants, and the productivity gains from increased volumes of patients seen, can benefit consumers through lower prices or a greater variety of services.

Notwithstanding the anticompetitive nature of these types of restrictions, they are frequently defended on the grounds that they help maintain a high level of quality in the professional services market. Proponents claim, for example, that business relationships between professionals and non-professionals are undesirable because they permit lay interference with the professional judgment of licensees. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners to maintain profits.

Some studies of the delivery of optometric services appear to contradict these contentions, however. They indicat that the presence of innovative arrangements such as chain stores in optometric markets is likely to strengthen both price and service competition.[3] Such arrangements can increase consumer access to optometric care by permitting the establishment of high-volume practices that charge significantly lower prices without sacrificing the quality of care provided. The results of these studies may be applicable to similar restrictions in other areas, such as podiatry.

The statute prohibiting podiatrists from practicing in connection with commercial establishments could also have anticompetitive effects even standing alone, apart from the corporate practice restriction. This restriction effectively

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[3] Bureau of Economics, Federal Trade Commission, Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Lens Fitting By Ophthalmologists, Optometrists and Opticians (1983); Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

prohibits podiatrists from providing services in locations frequented by numerous consumers, for instance, on the premises of a department store or shopping mall.[4] Consumers desire and can benefit from convenient access to goods and services, including professional goods and services. Restrictions on practicing in commercial locations can reduce the accessibility of podiatry services as well as consumers' opportunity to choose among a variety of providers practicing at different locations.

Similarly, the restriction on corporate practice can, by itself, have anticompetitive effects. Corporate business arrangements can be procompetitive because they may be a means to raise needed equity capital to start or expand a practice. For example, podiatrists may want to finance their practice by becoming co-workers with outside investors or put together chains of clinics or other types of innovative arrangements to accommodate high volume practices. Because current law precludes a sale of stock, podiatrists may be forced to rely on more expensive alternative financing. The cost of obtaining bank financing or personal loans may be a significant impediment to entry. If raising needed equity capital is made more difficult, some podiatrists may be deterred from entering the market altogether. Competition may be lessened because of the reduced entry of new podiatrists, and potential productivity gains from innovative practice arrangements may be inhibited.

We are also concerned that the restriction on corporate practice may hinder the development of ambulatory clinics, HMOs, preferred provider organizations ("PPOs"), or other innovative types of health care organizations. For example, if these types of organizations hire or affiliate with podiatrists, they may be considered to be engaged in the delivery of podiatry services in a manner prohibited by §40-51-210. If the South Carolina provision is interpreted in this manner (cf. American Medical Association, 94 F.T.C. 701, 1016-18 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982)), it could restrict the development of efficient arrangements between podiatrists and clinics, HMOs, or PPOs. Because these organizations can provide quality health care services and health care financing at discounted prices, a restriction that impedes their development can harm consumers.

The anticompetitive effects of restrictions on corporate practice were carefully considered by the Commission in the American Medical Association case. The Commission found that AMA

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[4] See, e.g., Oklahoma Optometric Association, 106 F.T.C. 556 (1985)(consent order)(settling charges that the association's prohibition on franchise or other commercial arrangements unreasonably restrained competition and injured consumers).

rules preventing physicians from entering into various contractual relationships, such as affiliating with HMOs, unreasonably restrained competition and thereby violated the antitrust laws.[5] The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business arrangements. These restrictions also precluded competition by organizations not directly and completely under the control of physicians. The Commission found that there were no countervailing procompetitive justifications for these provisions.[6]

In sum, bans on corporate practice and on practice in connection with commercial establishments may deprive consumers of significant cost savings and convenience without providing any countervailing benefits in the quality of care podiatrists deliver. Thus, we urge the Council to recommend the repeal of these provisions.

III. Restrictions on the Practice of Occupational Therapy

The South Carolina Attorney General's Office has issued an opinion letter concerning the practice of occupational therapy.[7] That letter raises two issues of competition policy. First, it appears to hold that the corporate practice of occupational therapy is unlawful.[8] Second, it appears to hold that the employment of an occupational therapist by a corporation is

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[5] 94 F.T.C. at 1011-18.

[6] See also Michigan Optometric Association, 106 F.T.C. 342 (1985)(consent order)(settling charges that an optometric association's prohibition of corporate practice unreasonably restrained competition and injured consumers).

[7] See letter from Robert D. Cook, Assistant Attorney General to Barbara Waugh, Secretary, Occupational Therapy Board (September 8, 1982)(hereinafter cited as "Waugh Letter').

[8] Waugh letter at 2. The attorney general's opinion is based on a common law rule prohibiting a corporation from engaging in a learned profession. It cites Wadsworth v. McRae Drug Co., 203 S.C. 543, 548, 28 S.E.2d 417 (1943)(holding that a corporation may not engage in the practice of a learned profession even through a licensed employee). The opinion letter also emphasizes the absence of any statutory authority for the Board of Occupational Therapy to issue a license to practice occupational therapy to a corporation. See S.C. Code. Ann. § 40-36-10 et. seq.

prohibited.[9] South Carolina does not have any statutes or regulations containing such restrictions. Rather they are apparently found in the common law of South Carolina.

The restrictions identified by the Attorney General's office are likely to hinder, or prevent altogether, the development and formation of innovative forms professional practice by occupational therapists. Thus, we urge the Council to recommend that the legislature act to alter the common law to permit corporate practice by occupational therapists and their employment by a corporation.

We have previously discussed our concerns about the potential anticompetitive effects of a restriction on the corporate practice of podiatry. These concerns are likely to be applicable to prohibitions on incorporation by occupational therapists as well. Therefore, we refer the Council to our comments on that subject in Part II above.

The restriction on the employment of occupational therapists by a corporation may also generate significant anticompetitive effects and increase costs to consumers.[10] For example, occupational therapists may seek to associate with corporations such as ambulatory clinics or HMOs and agree to accept compensation in the form of a salary. Such an arrangement may allow occupational therapy services to be delivered to the public in connection with a variety of other health care services or through a more competitive cost structure. Consequently, the employment of occupational therapists under a salary arrangement can increase consumer choice by increasing price and service competition among occupational therapists.

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[9] Waugh letter at 3-7. The opinion cites to an early South Carolina case holding that a corporation was forbidden to employ a licensed professional, because employment by a corporation could be used as an "expedient" to circumvent the existing restrictions on corporate practice. See Ezell v. Ritholz, 188 S.C. 30, 198 S.E. 419 (1938).

[10] See e.g., American Medical Association, 94 F.T.C. at 1016 (finding that AMA had illegally conspired to restrain its members from working on a salaried basis or at less than ordinary rates for hospitals, HMOs, and other institutions); American Society of Anesthesiologists, 93 F.T.C. 101, 102 (1979)(consent order)(settling charges that the society, through its ethical guidelines and membership requirements, illegally restrained members from being paid on other than a fee-for-service basis or from becoming salaried hospital employees).

The availability of salaried employment also may be an important option for those occupational therapists who cannot obtain the capital necessary to open a practice or who seek to avoid the difficulties of debt financing. Salaried employment can present fewer economic risks than independent practice. If occupational therapists desire salaried employment but are prevented by law from accepting it, they may be deterred from entering the market, thus decreasing the availability of occupational therapists.

We therefore urge the Council to recommend that the legislature permit corporate practice by occupational therapists and the employment of occupational therapists by corporations.

IV. Regulations of the Board of Speech and Audiology Examiners

The Board of Speech and Audiology Examiners has adopted regulations that contain two provisions that could have significant anticompetitive effects. The first of these provisions, S.C. Admin. R. 115-15 D(5), requires speech pathologists and audiologists to "announce their services in a manner consistent with the highest professional standards in the community." The second provision, S.C. Admin. R. 115-15 D(4), prohibits speech pathologists and audiologists from "using professional or commercial affiliations in any way that would mislead or limit services to persons served professionally." These restrictions are anticompetitive because they may suppress the dissemination of potentially useful information and may well contribute to an increase in prices. We therefore urge the Council to recommend their repeal.

The Commission has long been concerned about public and private restrictions that limit the ability of professionals to engage in truthful, nondeceptive advertising.[11] The Supreme Court has emphasized the vital role that advertising plays in promoting the efficient allocation of society's scarce resources.[12] Studies indicate that prices for professional goods

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[11] See, e.g., American Medical Association, 94 F.T.C. at 1023.

[12] See, e.g., Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2279-80 (1985)("the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful"); Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977)("commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system").

and services are lower where advertising exists than where it is prohibited,[13] and provide evidence that, while advertising is likely to lead to lower prices, it does not lead to lower quality services.[14] Therefore, to the extent that truthful, nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result. For this reason, we believe that only false and deceptive advertising should be prohibited.

The requirement that advertising be "consistent with the highest professional standards in the community," is similar to the dignity requirement that the Supreme Court addressed in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265 (1985). Both requirements in large part regulate the manner, rather than the content, of advertising. They are therefore overbroad and go beyond what is necessary to protect consumers.[15] The Supreme Court held in Zauderer, in a First Amendment context, that a state's interest in promoting dignity in an attorney's communication with the public is insufficient to justify a restriction on truthful and nondeceptive advertising.[16] Like the disciplinary rule invalidated in Zauderer, a provision such as S.C. Admin. R. 115-15 D(5), which requires advertisements to meet the "highest" professional standards in a community, may be interpreted to prohibit, or may have a chilling effect on, truthful, nondeceptive advertising.

The phrase "highest standard in the community" is, like the concept of "dignity," vague and subjective. It may be interpreted so broadly as to prohibit a wide variety of truthful, nondeceptive advertising, including, for example, dramatizations, graphic illustrations, comparative advertising, or testimonials. These advertising techniques are not inherently deceptive and are widely used in other contexts to communicate a message effectively to consumers. Even if the provision is not actually interpreted in this manner, moreover, it may still deter speech pathologists and audiologists from engaging in some forms of

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[13] See supra note 3; see also Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

[14] See supra note 3.

[15] See letter from Jeffrey I. Zuckerman, Director, Bureau of Competition, to Thomas S. Johnson, Chairman, Commission on Advertising, American Bar Association (December 8, 1986).

[16] 105 S.Ct. at 2280-81.

advertising for fear of violating the regulation. Finally, the regulation is unnecessary, because, in competitive markets, consumers are able to decide what they consider to be acceptable forms of marketing and will withhold their business from providers whose advertisements they regard as "undignified" or offensive.

The second provision imposes a ban on "using" commercial affiliations improperly. It is not clear to us how the Board interprets or would apply this provision. To the extent that this regulation prohibits materially misleading practices, it is unnecessary, because such practices are prohibited elsewhere in the regulations.[17] To the extent that this regulation is intended to go beyond a simple prohibition on deceptive practices, and to substantially restrict forms of commercial practice by speech pathologists or audiologists, it may interfere with the efficient delivery of professional services. We therefore refer the Council to our comments above in Part II on that subject.

Thus, because both of the restrictions discussed above appear to unnecessarily limit competition and consumer choice, we urge the Council to recommend their repeal.

V. Regulations of the Board of Psychology Examiners

S.C. Code Ann. § 40-55-60 provides that the Board of Psychology Examiners must adopt the American Psychological Association's ("APA's") Code of Ethics. Pursuant to this statute, the Board has adopted the APA's Code of Ethics, both by reference, S.C. Admin. R. 100-4, and by reprinting the text of the APA's principles relating to advertising and fee splitting. S.C. Admin. R. 100-6. We urge the Council to recommend the repeal of both S.C. Ann. § 40-55-60 and the Board's implementing regulations.

There are significant risks of anticompetitive effects when a code of ethics of a private organization composed of competitors is adopted by a state or state board. Provisions contained in ethical codes developed by a private group of professionals composed of competitors may restrict competition among members of the group and be inconsistent with the best interests of consumers. We discuss below the kinds of consumer injury that can be caused by restrictions contained in such ethical codes and that appear to arise from § 40-55-60 and the Board's implementing regulations.

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[17] See S.C. Admin. R. 115-15 D(3).

Some private professional associations composed of competitors have adopted a wide range of anticompetitive restrictions on advertising and other forms of competition by their members. For instance, such associations have limited the kind of fee advertising that is permissible, restricted comparative advertising, prohibited testimonials as to the quality of services provided, restricted advertising that appeals to consumers' emotions, prohibited direct solicitation of consumers, and banned certain fee-splitting arrangements. See, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978); American Medical Association, 94 F.T.C. at 1018; Oklahoma Optometric Association, 106 F.T.C. 556 (1985)(consent order). Such ethical rules are often broader than necessary to prevent false or deceptive advertising, and thus needlessly restrain competition. As discussed above, advertising standards should be implemented only where specific forms of promotion are inherently likely to deceive or where there is evidence that particular forms of advertising have in fact been deceptive. See American Medical Association, 94 F.T.C. at 1009-10; see also In re R.M.J., 455 U.S. 191, 202 (1982).

Restrictions on fee advertising, for example, can directly stifle price competition and thereby harm consumers. Fee advertising for professional services, whether through the publication of specific fees, a range of fees, or other means, can disseminate useful information to consumers and may help to keep fees competitive. See Bates v. State Bar of Arizona, 433 U.S. 350, 377 (1977) (the lack of price information in attorney advertising "serves to increase the [consumer's] difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . attorneys are isolated from competition and the incentive to price competitively is reduced"). As a general proposition, when consumers are able to obtain more information on the prices at which goods or services are offered, prices are lower. A restriction on the manner of advertising professional fees may prevent advertisements designed to increase consumers' awareness of existing fee levels or any discounts from usual fees.

Restrictions on comparative advertising are also likely to harm consumers. When sellers cannot compare the attributes of their services to those of their competitors, their incentive to improve or to offer different services, products, or prices can be reduced. These restrictions are likely to be especially harmful to competition and consumers because comparison of the fees or services offered by competing professionals may be helpful to consumers in deciding whether care is affordable and what specific professional services are offered. Comparative advertisements are not inherently deceptive, and permitting them may increase the effectiveness of advertising and result in lower

prices and the dissemination of useful information to consumers.

Like comparative claims, testimonials can be a means to disseminate useful and truthful information that consumers may use in selecting a provider. Testimonials pertaining to quality or efficiency can inform consumers about such attributes as a professional's training or methods of practice. Such testimonials can be a highly effective means of attracting and informing clients and fostering competition. Although testimonials, like all advertising, have the potential to be deceptive, there is no inherent deception in the use of testimonials as to the quality of a professional's services. Testimonials as to short waiting time before appointments or expressing general consumer satisfaction, for example, are not inherently deceptive and can provide useful information. Prohibiting all such advertising is overbroad.[18]

A prohibition on making statements that are intended or likely to appeal to a client's fears, anxieties, or emotions may also be overbroad. Of course, there may be individuals who are especially vulnerable to such appeals, and the Board may well want to consider this factor when determining whether a particular advertising claim is false or deceptive. However, advertisements such as those containing presentations of simulated real-life problems (e.g., depicting the consequences of drug abuse or marital conflict) that strike an emotional chord in a viewer or listener can be a very effective way to alert some consumers to the need for professional treatment, while not exploiting vulnerable consumers. We do not believe that the risk that some consumers may be vulnerable justifies a blanket prohibition on advertising that is not inherently deceptive.[19]

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[18] See In re R.M.J., 455 U.S. at 203 (1982)(holding that states may not place an absolute prohibition on information that is potentially misleading if the information can be presented in a manner that is not deceptive).

[19] The Commission, in the context of a formal advisory opinion, emphasized that a provision of a proposed ethical code prohibiting "unfair" or "oppressive" communications that cause consumers anxiety would not violate the antitrust laws only insofar as it was enforced reasonably and objectively to avoid discouraging the dissemination of available information to consumers. American Academy of Ophthalmology, 101 F.T.C. 1018, 1024 (1983). See generally the Commission's Policy Statement on Deception, reprinted in Cliffdale Associates, Inc., 103 F.T.C. 110, 179 (1984)(Commission's test for deception takes into account, among other things, the likely impact on the audience to whom the advertisement is addressed).

Restrictions on direct solicitation of clients can also be anticompetitive. See American Medical Association, 94 F.T.C. at 1005. Such restrictions prohibit what can be a valuable technique for informing consumers about the availability of a professional's services. Solicitation, in and of itself, is not inherently deceptive. The Supreme Court has ruled in the First Amendment context that a state may regulate in-person solicitation by attorneys of clients, where the individual being solicited would be forced to bargain from adverse circumstances (e.g., after suffering a personal injury). See Ohralik v. Ohio State Bar Association, 436 U.S. 462, 468 (1978); see also In re Primus, 436 U.S. 412 (1978). Under such circumstances, the Supreme Court found, there is a potential for abuse inherent in the face-to-face selling of legal services. In view of this potential for abuse, regulations prohibiting uninvited, in-person solicitation of persons who are particularly vulnerable to undue influence may be appropriate.[20]

Finally, restrictions on fee-splitting arrangements may, depending on how they are interpreted, interfere with the operation of alternative health care delivery systems that may have incentive arrangements with health care professionals in which fees are divided between the medical plan and the professional. Such restrictions can impede legitimate cost containment measures implemented by such organizations as HMOs.

Restrictions on fee-splitting may also prevent professionals from paying an independent referral service that matches clients with an appropriate practitioner. As a result, it may be more difficult for consumers to identify practitioners with whom they would like to deal. It is not clear that any regulation of referral fees is necessary. If, however, such regulation is considered to be necessary in order to prevent deception, the less restrictive alternative of requiring disclosure to the consumer of the referral fee arrangement might be imposed.

For the reasons expressed above, we urge the Council to recommend the repeal of the statutory requirement that the Board adopt the APA's Code of Ethics and recommend that the Board delete the APA's Code of Ethics from its regulations.

VI. Conclusion

For the foregoing reasons, we urge that the South Carolina Legislative Audit Council consider whether the statutes and regulations discussed above are reasonably necessary to protect consumers, and we urge the Council to seek the repeal or modification of the provisions that are not necessary to these

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[20] See American Medical Association, 94 F.T.C. at 1030.

ends. We appreciate having had this opportunity to present our views. We would be happy to furnish you copies of any of the reports that we have mentioned, and to answer any questions you may have regarding these comments or to provide any other assistance you may find helpful.

Sincerely,

Jeffrey I. Zuckerman
Director
Bureau of Competition